No. 02-515

Supreme Court, U.S.
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In The

Supreme Court of the United States

DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER INC., AND HOFFINGER INDUSTRIES,

Petitioners,

v.

KENNY COYLE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Kenny Coyle was injured sliding into an above-ground pool manufactured by Petitioner Doughboy Recreational Div. of Hoffinger Inc. and Hoffinger Industries ("Hoffinger"), which has maintained for years that slides should *never* be used with its pools, but did *nothing* to warn dealers, installers, owners and users not to install or use slides.[1] On the contrary, Hoffinger included use and care of slides in literature accompanying its pools. Mr. Coyle alleged the pool was defective because it had no warning that slides were not to be attached. The case was tried to a jury under the Oklahoma law of manufacturers' products liability as adopted in *Kirkland v. General Motors Corp.*, 1974 OK 52, 521 P.2d 1353. The jury awarded Mr. Coyle $2 million and he has collected the judgment and interest from a bond posted by Hoffinger during the Oklahoma appeal process.

Hoffinger makes only above-ground pools and does not manufacture slides. There are no regulations of the Consumer Product Safety Commission ("CPSC") regarding *pools*. CPSC regulates only swimming pool *slides*. Although the CPSC decided not to prohibit the use of slides with above-ground pools, Hoffinger was free to attach such a prohibition to its product and should have done so under its common-law duties. If a warning had been given by Hoffinger, there simply would not have been a slide attached to the pool.

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[1] It knew its dealers sold slides with its pools. Petition, p. 12A contains a typographical error in the Court of Civil Appeals opinion where it says "there was *not* evidence that Hoffinger knew . . . ".

Evidence that Mr. Coyle had consumed 3.2 percent beer was not admitted at trial. Contrary to Hoffinger's argument (Petition, pp. 5-6), all defendants, including Hoffinger, admitted there were no witnesses to testify he was impaired. The defendants other than Hoffinger did not oppose Mr. Coyle's motion in limine on the issue because they felt it would have been reversible error to admit such inflammatory evidence.

Before trial, Hoffinger learned Mr. Coyle and the other two defendants (the pool/slide dealer and the slide distributor) had entered into a "high-low" agreement. The trial court found it was an acceptable agreement that would require the dealer and distributor to "represent their clients zealously". Contrary to Hoffinger's assertions, the high-low agreement did not change the positions the other defendants had been taking consistently in the lawsuit; as distributors/retailers, their position had been that the pool and slide manufacturers were responsible for the design and warning defects and blamed Hoffinger for not telling them about the danger of placing a slide on its above-ground pool. A Hoffinger quality control manager had basically admitted at trial that the pool was defective. In addition, Hoffinger had taken an adversarial position toward the dealer, claiming the dealer should not have sold the slide to the pool owner. When the other defendants actually settled during trial, the jury was informed of the fact, but not the amount, of the settlement.

ARGUMENT & AUTHORITY

I. THE HIGH-LOW AGREEMENT WAS PROPER

Because of the high-low agreement of Coyle with the slide distributor and the pool dealer, those defendants proceeded to trial with the risk they would have to pay the high amount if Mr. Coyle obtained a substantial verdict. It was therefore to their advantage to keep damages low. The Oklahoma Supreme Court has prohibited "Mary Carter" agreements in which a defendant conditionally settles, remains in the lawsuit and whose liability is decreased in direct proportion to the increase in the non-agreeing defendants' liability. *Cox v. Kelsey-Hayes Co.*, 1978 OK 138, 594 P.2d 354. The agreement here was not a Mary Carter agreement because the dealer and distributor were not to benefit at the expense of Hoffinger. The agreement and the fact it was not revealed to the jury did not affect Petitioner's rights of due process.

II. FEDERAL PREEMPTION IS NOT AN ISSUE WHEN A SLIDE SHOULD NOT HAVE BEEN INSTALLED WITH ANY HOFFINGER POOL

Hoffinger admits there are no federal requirements for labeling swimming pools. There can be no express preemption of products liability law regarding pools. There is also no implied preemption because there can be no conflict between federal regulations of slides and warnings on pools that prohibit the installation of a slide. *See*, *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000); *California v. ARC America Corp.*, 490 U.S. 93, 100-101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). CPSC established the "Safety Standard for Swimming Pool Slides", with regulations for materials,

strength and performance of slides and slide components, and warnings showing proper techniques for use of slides. 16 C.F.R. §1207. Notably, CPSC specifically stated it did not have the statutory authority to regulate installation of slides. 16 C.F.R. §1207.1. Although the standard applies to all pool slides, whether attached to above-ground, on-ground or in-ground pools, the standard never had any applicability to Hoffinger pools. Hoffinger could have warned that slides should simply *not* be installed with its pools. There is no possibility that a no-slide warning would conflict with mandated slide warnings.

In urging federal preemption, Hoffinger takes a stance totally inconsistent with its position that slides should not be installed with its pools. Hoffinger cannot shift the responsibility for safe design of its pools to the slide manufacturers and federal regulators of slides.

III. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN A JURY DETERMINED THE ISSUE OF DEFECTIVENESS

Hoffinger argues its rights to due process were violated by the fact that the court submitted the question of defectiveness of the product to the jury. The jury by their verdict found, under the "consumer expectation test" of manufacturers' products liability in Oklahoma, the pool was unreasonably dangerous, i.e. "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics". *Kirkland*, 521 P.2d at 1362-63. It cannot violate due process for a jury to determine consumer expectations.

CONCLUSION

For the above reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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